No. 83-277

In The
# Supreme Court of the United States
October Term, 1983

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS,

*Petitioner,*

vs.

HOME SAVINGS AND LOAN ASSOCIATION OF LAWTON, OKLAHOMA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Administrator of Veterans Affairs may be equitably estopped from asserting the defense of forgery to a loan guaranty claim (38 U. S. C. Ch. 37), where the Veterans Administration has actual knowledge of an alleged forgery when it accepts a sheriff's deed and thereafter sells the real property without advising the holder (Home Savings and Loan) of the forgery or V. A.'s investigation.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



STATUTES AND REGULATIONS

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Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari seeking review of the Tenth Circuit's decision in this case. That decision is reported at 695 F. 2d 1251 and Appendix A, Pages 1A-26A of the Petition.

The opinion of the District Court (West, J.) is not reported, but appears in Appendix C, Pages 30A-37A of the Petition.

## STATEMENT OF THE CASE

### A. Procedural Background

This action originated in the District Court of Oklahoma County, Oklahoma, the Administrator of the Veterans' Administration (now Veterans Affairs), being subject to the jurisdiction of the State Court pursuant to 38 U. S. C. § 1820(a) (1).[1]

Home Savings and Loan Association commenced the suit to recover the sum of $7,838.13 on a loan guaranty certificate issued by the Veterans' Administration.

The action was removed by the Administrator to the United States District Court for the Western District of Oklahoma pursuant to 28 U. S. C. § 1346(a), § 1361 which authorize suit in Federal Court when an employee of an agency of the United States is sued for actions that are within the scope of his office.

On July 22, 1980, the Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, entered judgment in favor of Home Savings against the Veterans' Administration in the amount of $7,838.13, which included $6,733.19 on its loan guaranty claim and $1,104.94 in amounts which were wrongfully offset against it.

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[1] 38 U.S.C. § 1820(a)(1) provides:

"Notwithstanding the provisions of any other law, with respect to matters arising by reason of this chapter, the Administrator may - (1) *Sue and be sued in the Administrator's official capacity in any court of competent jurisdiction, state or federal,* but nothing in this clause shall be construed as authorizing garnishment or attachment against the Administrator, the Veterans' Administration, or any of its employees."

On September 9, 1980, the Trial Court granted Home Savings' motion to tax prejudgment interest and ordered the Administrator to pay the statutory rate of six percent (6%) from the date the amount was owed until the date of judgment.

On appeal, the V. A. contested the applicability of equitable estoppel as well as the award of prejudgment interest. Thereafter, the Veterans' Administration withdrew its assertion of error regarding the award of prejudgment interest to Home Savings. (App. A, Page 8a of the Petition).

The judgment of the Trial Court was affirmed by the Court of Appeals (McKay, J., dissenting). The majority carefully scrutinized the "affirmative actions" of the V. A. and concluded that the invocation of equitable estoppel against the Veterans' Administration was warranted under the circumstances in this case. The Court of Appeals acknowledged the decisions of this Court and found nothing which clearly foreclosed the availability of equitable estoppel against the government based upon the facts presented in the case at bar.

In concluding that the V. A. was estopped from denying the validity of the original loan transaction, the Court of Appeals particularly noted that the V. A. "acquired and sold the property without disclosure to Home Savings of the forgery possibility." (App. A, Pages 7a of Petition). The majority also agreed with the Trial Court that the imposition of estoppel has not harmed the fiscal policies of the United States since the Veterans' Administration has an independent right of indemnity from the borrowing veterans. (App. A, Page 7a of the Petition).

In his dissent, Judge McKay disagreed with the majority's characterization of Respondent's claim as a "commercial transaction." (App. A, Page 13a, et seq., of the Petition). Judge McKay did not believe that the loan guaranty could be properly characterized as a proprietary commercial transaction for the purpose of applying equitable estoppel against the government. (App. A, Page 14a of the Petition). According to Judge McKay, the loan and guaranty program is a "subsidy in support of a public policy objective." Moreover, Judge McKay could perceive no differences between the loan guaranty program for veterans and the crop insurance program for farmers, as discussed in *Federal Crop Insurance Corp. v. Merrill,* 332 U. S. 380 (1948). (App. A, Page 15a of the Petition).

On April 25, 1983, the Administrator's Petition for Rehearing with the suggestion for rehearing en banc was denied. Circuit Judges McKay, Logan and Seymour dissenting. (App. B, Pages 27a-29a of the Petition).

### B. Facts Material to the Consideration of the Question Presented

As the Administrator has stated and Home Savings agrees, this case originally arose out of a default on a note and mortgage upon which the Veterans' Administration had issued a loan guaranty certificate pursuant to 38 U. S. C. Ch. 37.

In April 1971, Oklahoma Mortgage Company loaned $34,000.00 to Percy Durham, a veteran, and his wife, Zelma Durham. The note, mortgage and loan guaranty certificate were assigned to Home Savings and Loan Association.

On or about March 1, 1974, the mortgagors, Percy L. and Zelma R. Durham, defaulted on the note and mortgage and a foreclosure suit was instituted by Home Savings on July 12, 1974, in a case filed in the Oklahoma County District Court. The co-mortgagor, Zelma R. Durham, was personally served with process and made no denial that she was co-mortgagor, nor did she make any assertion that her signatures on the note and mortgage were not genuine nor valid.

On or about December 6, 1974, a Journal Entry of Judgment was entered in the foreclosure case by the District Court, which effectively quieted title to the property and specifically recited:

> "The Court further finds that the Defendants and original mortgagors, Percy L. Durham and Zelma R. Durham, husband and wife, made, executed and delivered the note and mortgage sued upon by the Plaintiff (Home Savings), and that said Plaintiff is the owner/holder thereof by assignment of record."

The property was sold by the sheriff of Oklahoma County, with appraisement, to Home Savings, on January 28, 1975, pursuant to special execution and order of sale, for the sum of $30,000.00, the amount the Veterans' Administration specified pursuant to 38 C. F. R. § 36.4320 (a). Home Savings elected to convey the property to V. A. and on February 24, 1975, the V. A. accepted a sheriff's deed pursuant to the order of Home Savings. On approximately the same date, February 24, 1975, the Veterans' Administration obtained actual knowledge through Oklahoma Mortgage Company, that the signature of co-mortgagor, Zelma R. Durham, was allegedly forged on the note and mortgage. Based upon this information, the

Veterans' Administration initiated an investigation into the alleged forgery, however, Home Savings was never notified by the V. A. of either the forgery allegation or of the V. A. investigation.

On March 28, 1975, Home Savings submitted its claim for reimbursement under the loan guaranty certificate in the amount of $6,739.68. In filing its claim for reimbursement, Home Savings complied with all of the applicable rules and regulations of the Veterans' Administration. Thereafter, on April 4, 1975, the Veterans' Administration forwarded $30,000.00 to Home Savings representing the sale price of the property specified by V. A. at the sheriff's sale.

On April 16, 1975, the Veterans' Administration, with full knowledge that an alleged forgery existed on the note and mortgage, and having received Home Savings' claim for reimbursement on the loan guaranty certificate, sold the subject property for the sum of $31,000.00. This sum represented a cash downpayment of $2,000.00 and $29,000.00 being financed by the Veterans' Administration under the terms of the separate note and mortgage. The selling price was $1,000.00 more than the price which the Veterans' Administration had paid Home Savings for the property. Some time later, Home Savings' claim for reimbursement on the loan guaranty was reduced to $6,733.19 because of a variance in interest computation, on October 16, 1975, the Veterans' Administration issued Home Savings a treasury check in that amount. On October 22, 1975, Home Savings received this check representing the amount due on the loan guaranty and negotiated it. Later that week, on October 28, 1975, the Veterans' Administra-

tion requested the return of the check, stating that it had been issued in error. Home Savings then issued a new check to the V. A. in the above stated amount as the original check had already been cashed.

The Veterans' Administration ultimately denied Home Savings' claim for reimbursement on the loan guaranty certificate, based upon its own internal investigation and determination that Zelma R. Durham's signature on the note and mortgage was a forgery. The investigation conducted by the Veterans' Administration was instituted without notice or hearing afforded Home Savings, and it had no opportunity to participate in the depositions or have access to handwriting samples.

On January 19, 1976, the Veterans' Administration demanded an additional $1,055.44 plus daily interest of $.18, which allegedly represented the V. A.'s loss as a result of the costs incurred in the transfer and sale of the property. Home Savings refused to comply with this last demand and the Veterans' Administration collected the amount by an offset against a subsequent unrelated claim. Thus, on October 20, 1976, the Veterans' Administration collected from Home Savings by offset, the amount of $1,104.94. (App. A, Pages 32A-34A of the Petition).

On July 11, 1973, Mrs. Zelma R. Durham, joined with her husband, Percy Durham, and conveyed all of their right, title and interest in the subject property to John Gilbert Durham, by warranty deed. It is uncontroverted that Mrs. Durham did in fact execute this deed by virtue of her admission at trial. (Tr. 21-22).

## REASONS FOR DENYING THE PETITION

### A. The Administrator's Petition Fails to Present Special and Important Reasons to Invoke the Jurisdiction of this Court.

The reasons advanced in the Administrator's Petition to obtain this Court's review on Writ of Certiorari, can be properly characterized as ridiculous.

In this connection, Petitioner seeks to leave this Court with the impression that:

> "The decision of the Court of Appeals threatens the sound administration of the V. A. Home Loan Guaranty Program, as well as other federal programs, by preventing recovery of substantial sums of money owed to the government." (Page 11 of Petition).

Regretfully, the Administrator fails to articulate in precise terms, the basis for such a conclusionary statement. Instead, he focuses on the factual circumstances in this case and asserts that imposition of equitable estoppel is not justified. This Court ordinarily does not grant certiorari to review evidence and discuss specific facts. *The United States v. Johnston,* 268 U. S. 220, 227 (1925).

Moreover, the Administrator's petition fails to identify any conflict between the Circuit decisions. In fact, other circuits have generally held that the government can be equitably estopped. See e. g., *Russell Corporation v. United States,* 537 F. 2d 474 (Ct. Cl. 1976); *Corniel-Rodriguez v. INS,* 532 F. 2d 301 (2d Cir. 1976); *Walsonavitch v. United States,* 335 F. 2d 96 (3d Cir. 1964); *Tuck v. Finch,* 430 F. 2d 1075 (4th Cir. 1970); *Simmons v. United States,* 308 F. 2d 938, 945 (5th Cir. 1962); *Portmann v.*

*United States*, 674 F. 2d 1155 (7th Cir. 1982); *Meister Bros. v. Macey*, 674 F. 2d 1174 (7th Cir. 1982); *United States v. Fox Lake State Bank*, 366 F. 2d 962 (7th Cir. 1966); *United States v. Wharton*, 514 F. 2d 406 (9th Cir. 1975); *Semaan v. Mumford*, 335 F. 2d 704, 706 (D. C. Cir. 1964). The decision of the Tenth Circuit is in complete accord with the above mentioned Circuits.

Supreme Court Rule 17 clearly provides that review "will be granted only when there are special and important reasons therefor." The estoppel issue in the present case is narrow and unique to its facts and no amount of government rhetoric can convert it into one warranting review on certiorari. The insufficiency to warrant a grant of certiorari is aptly demonstrated at Page 10 of the Petition wherein Petitioner erroneously concludes:

> ". . . the decision conflicts with this Court's repeated instruction to the lower Courts not to use estoppel as a means of circumventing statutorily authorized restrictions on payments from the Federal Treasury."

*Schweiker v. Hansen*, 450 U. S. 785 at 788, quoting *F.C.I.C. v. Merrill*, 332 U. S. 380 at 385 (1947).

The Administrator conveniently ignores and fails to address the distinguishing characteristics between the instant case and *Schweiker v. Hansen*, supra. In *Schweiker*, this Court noted that in several of the cases it distinguished "the government had entered into written agreements which supported the claim of estoppel" and that in others, "estoppel did not threaten the public fisc." It is readily apparent from an examination of the Court of Appeals' well reasoned opinion, that the case at bar clearly

exhibited both these distinguishing characteristics. This issue will be more fully addressed in Section B.

As Respondent has previously stressed, the reasons set forth in the Administrator's Petition for Certiorari for further prolonging this controversy are wholly lacking in substance.

This is not a case where the Court should exercise its discretion and grant the Writ of Certiorari because the facts are peculiar to this case and the Administrator simply disagrees with the result.

**B. Equitable Estoppel is Properly Invoked Against the Administrator.**

At the outset, it is necessary to dispel the Administrator's erroneous statement that the doctrine of sovereign immunity prohibits the imposition of equitable estoppel against the government. (Page 11 of the Petition).

There can be no doubt that sovereign immunity has been waived by virtue of 38 U. S. C. § 1820(a) (1) which provides:

> "Notwithstanding any other law, with respect to matters arising by reason of this chapter, the Administrator may - 1. Sue and be sued in the Administrator's official capacity in any competent jurisdiction, state or federal . . . ."

Thus, it is clear that Congress "launched the Veterans' Administration into the commercial world" and fully authorized the practice of acting as guarantors of mort-

gage loans in a proprietary or business capacity, as opposed to a governmental or sovereign function.[2]

As this Court stated in *United States v. Shimer*, 367 U. S. 374, 383, 81 S. Ct. 1554, 1561, 6 L. Ed. 2d 908:

> "Congress intended the guaranty provisions to operate as the substantial equivalent of a downpayment in the same amount by the veteran on the purchase price, in order to induce perspective mortgagee-creditors to provide, one hundred percent financing for a veteran's home."[3]

Underlying all of the recent government estoppel cases decided by this Court, is the concept that affirmative misconduct by the government may be sufficient to invoke the doctrine of equitable estoppel against the government.[4] These decisions clearly imply that, presented with the proper case, this Court would find affirmative misconduct sufficient to estop the government. Even Petitioner concedes that affirmative misconduct may be grounds for estopping the government. (Petition Page 10).[5]

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[2]Both the Administrator (Page 14 of the Petition) and McKay, (App. A, Page 14a of the Petition), erroneously state that the loan guaranty cannot be properly characterized as a proprietary commercial transaction for the purposes of applying equitable estoppel against the government.

[3]Thus, it is clear that the guaranty is considered the equivalent of a downpayment in an ordinary commercial transaction and not like a subsidy as urged by the Administrator and Judge McKay. (App. A, Pages 14a-15a of the Petition).

[4]*INS v. Miranda*, — U. S. —, 74 L. Ed. 2d 12 (1982); *Schweiker v. Hansen*, 450 U. S. 785 (1981); *INS v. Hibi*, 414 U. S. 5 (1973); *Montana v. Kennedy*, 366 U. S. 308 (1961).

[5]At Page 10 of his Petition, the Administrator states that "serious" affirmative misconduct is required to estop the gov-

(Continued on following page)

Both the District Courts and Court of Appeals correctly determined that the affirmative misconduct of the V. A. arose from its actions in acquiring and selling the property without disclosing to Home Savings of the forgery possibility. (App. A, Page 7a of the Petition).[6]

According to the Petitioner in the absence of a statute, regulation or constitutional provision to the contrary, V. A. had no obligation to disclose the allegation of forgery. This proposition is fundamentally erroneous and contrary to common law principles of guaranty contract law, which are generally applicable to the Veterans' Administration.[7] Moreover, in *Lynch v. U. S.*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) this Court specifically stated:

> "that when the United States government, or any branch thereof, enters into a contract with an individual, natural or corporate, it does so in its private or business capacity and not as a sovereign, and subjects itself to the same rules of law that govern contracts between individuals."

It is clear that Home Savings elected to convey the property to the Veterans' Administration pursuant to 38 C. F. R. § 36.4320(a) (1) since they had a valid loan guaranty certificate as well as a judicial finding in the foreclosure action that the original mortgagors, Percy L. Dur-

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ernment. None of the recent government estoppel cases, as mentioned above, contain any reference to "serious."

[6]McKay, J., dissenting also advances the untenable argument that V.A. had no legal duty to disclose an allegation of forgery. (App. A., Page 24a of the petition).

[7]28 Am. Jur. 2d Estoppel and Waiver § 68; *Mortgage Associates v. Cleland*, 494 F. Supp. 683 (1980), rev. on other grounds, 653 F. 2d 1144 (7th Cir. 1981).

ham and Zelma R. Durham, executed the note and mortgage. The manner in which the Veterans' Administration processed Home Savings' claim for reimbursement on the loan guaranty certificate can only be characterized as "business as usual," notwithstanding its knowledge of an alleged forgery.[5]

Certainly, Home Savings had every right to believe that the loan guaranty certificate would be honored since it complied with all of the applicable rules and regulations of the Veterans' Administration. Furthermore, the V. A.'s acceptance of the sheriff's deed based upon the foreclosure action, its payment of the specified amount ($30,000.00), and subsequent sale of the property on April 16, 1975, with actual knowledge of an alleged forgery, undoubtedly would and did, in fact, mislead Home Savings.

This case is certainly not analogous to either *Schweiker v. Hansen*, supra, or its predecessor, *F. C. I. C. v. Merrill*, supra. In the instant case, the government entered into a commercial written agreement which supported the claim of estoppel. Furthermore, the imposition of estoppel would not threaten the public fisc as this Court felt it would in *Schweiker*. Probably, the most

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[5]It is totally irrelevant that V.A. obtained knowledge of the forgery after Home Savings' election to convey the property to V.A. pursuant to 38 C.F.R. 36.4320(a)(1). The consideration ($30,000.00) for that option to convey was not forwarded to Home Savings until April 4, 1975, more than thirty (30) days from when V.A. had knowledge of the forgery. Home Savings had every right to revoke the election to convey the property and demand a reconveyance if there existed a bar to its loan guaranty claim.

striking dissimilarity is the existence of affirmative misconduct on the part of the Veterans' Administration.

After carefully weighing the equities in the context of these particular facts, it would be a great injustice if the Veterans' Administration was not held responsible for its affirmative misconduct in selling the property without notifying Home Savings of the forgery and the fact it would not be reimbursed on the loan guaranty certificate. The Veterans' Administration cannot accept the benefit of its sale and conveyance of April 16, 1975, while at the same time denying the validity of one of the essential elements of such conveyance. It is impossible for the V. A. to get the property back, and the decision of both the Trial Court and Court of Appeals recognized this.

As Justice Cardozo stated long ago, "It is a fundamental and unquestioned principle of our jurisprudence that no one shall be permitted to take advantage of his own wrong." *R. H. Sterns v. United States,* 291 U. S. 54, 61-62, 54 S. Ct. 325, 328, 78 L. Ed. 647, 653 (1934).

## CONCLUSION

The government has requested the Court to hold this case pending the disposition of *Heckler v. Community Health Services,* No. 83-56 (cert. granted October 3, 1983).

Home Savings submits that the pendency of the above mentioned case should not affect the disposition of the Administrator's Petition herein. The cases are vastly dissimilar and Respondent has presented compelling rea-

sons why this Court should end this litigation once and for all by denying certiorari.

Respectfully submitted,

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